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VIRGINIA LAW REGISTER

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Buried in scattered series of periodicals, or proceedings of Bar Associations is a wealth of legal learning which, could it be skillfully mined, would prove of vast usefulness. The Committee of American Law Schools, recognizing this fact, has culled from various sources select essays in Anglo-American History, two volumes of which have proven of so much value that the appearance of the third is looked forward to with the keenest interest by those who have been so fortunate as to possess the ones issued.

THE REGISTER in this issue reprints the paper read by Professor Charles A. Graves before the Virginia State Bar Association on August 2nd, 1893, not only in order to give it a more widespread circle of readers and on account of its intrinsic value, but to call attention to the fact that it has attracted widespread interest both in this country and abroad and has been quoted with approval by several of the Supreme Courts of the States of the Union. In *Myers v. Maverick*, 28 S. W. Rep., p. 716, the Appellate Court of the State of Texas quotes this article. In a learned essay in the *Law Quarterly Review* (London), edited by Sir Fred. Pollock, Bart., D. C. L. L. D., Sidney L. Phipson refers to it five times. It is referred to in the monographic notes of the Virginia Annotated Reports in *Hughes v. Hughes*, 2nd Munf., Va. Rep. Ann., pp. 417-436-438, and *Midlothian Coal Mining Company*, 18 Gratt., Va. Rep. Ann., 623-624. The entire article has been republished in the *American Law Review*, and the *American Lawyer*. It is a curious fact, however, that our own State Court of Appeals—whilst never distinctly deciding the question—has in an unbroken line of *dicta* from *Gatewood v. Burrass*, 3 Call 194, to *City of Roanoke v. Blair*, 103 Va. 639, held that there is a difference between a patent and a latent am-

biguity—a doctrine which Professor Graves denies and in which he is supported by nearly all of the law-writers.

With regard to the true object of legal interpretation, Mr. Phipson in the *Law Quarterly Review* approves of Professor Graves' views and speaks as follows:

"Professor Graves harmonizes the opposing views thus: 'What is it that the judicial expositor seeks to ascertain, is it the meaning of the words or the meaning of the writer? The question is frequently put in this way, as if the disjunction were complete and the answer must be one or the other. We answer, neither. Not the meaning of the words alone, nor the meaning of the writer alone, but the meaning of the words as used by the writer. It is not the meaning of the words in the abstract, for the meaning of the words varies according to the circumstances under which they were used; and not the meaning of the writer apart from his words, for the question is one of interpretation, and what the writer meant to say but did not, is foreign to the inquiry. * * * We must seek the meaning of the writer, but we must find it in his words; and we must seek the meaning of the words, but they must be *his* words, the words as he has used them, the meaning which they have in his mouth' (28 Amer. Law Rev., p. 323). This standpoint, which I venture to think the correct one, viz, that the object is to discover the meaning of the words as intended by the testator, has also, one may notice, the support of Sir H. Elphinstone, *supra*, and of Messrs. Underhill and Strahan (Interp. of Wills, p. 1)."

We are very sure that the profession will welcome the opportunity to have this article of Professor Graves' ready to their hand through the files of this magazine, and we are very much pleased to be able to call attention to the wide-spread interest which it has created amongst law writers in this and other countries.

The pendency of an appeal upon the questions raised by the so-called "Ward" law—important as they are—has resulted in a series of editorials from one or more leading papers in the state, warning our Supreme Court of the

The Lay Argument serious effects of a decision adverse to **—Ab Inconvenienti** the constitutionality of the act, and deplored the result of such a decision.

These papers—or their editors—ought to know better than to at-

tempt to influence the decision of a Court of Justice by such arguments, especially in view of the fact that their only influence will be to inflame the popular mind and pander to that sentiment which is too rife in our country, distrust and contempt for our high legal tribunals. These editorials grow out of a queer misconception of the function of the courts. Courts having nothing to do with results—on the contrary, they should absolutely disregard them. It is for the lawmaking power to weigh the effect of legislation. It is for the courts to say whether the legislation is constitutional. If it is, that ends the matter. If it is not, then that too ends the matter, and if evil comes of it and great public inconvenience, the fault must lie at the door of the makers of the Constitution, not at the door of the court which had nothing to do with the making of that instrument, but whose sworn duty it is to see that the Legislature shall not violate its provisions no matter how ruinous their effect. Courts may deplore an unwise unconstitutional provision, they cannot amend it; nor can they allow the Legislature to attempt to undo an error in the fundamental law. It is true some courts do attempt to make law, and there is much judge-made law; but no court we hope will ever be found whose opinion upon the right of a question can be allowed to be biased by the result of its decision. "Thou shalt not follow a multitude to do evil; neither shalt thou speak in a cause to decline after many to wrest judgment. Ye shall not respect persons in judgment; ye shall not fear the face of any man; for the judgment is God's." So spake the inspired Law Giver. The words are no less applicable to judges of today, than they were under the shadow of Sinai.

The dismissal of the case of the Government against the Standard Oil Company, or rather the direction of the judge that the jury should bring in a verdict of not guilty, disposes finally of the \$29,000,000 fine, though there are other **The Standard** cases pending, the result of which may yet be **Oil Cases.** serious for that corporation. The immense bill of costs which the Government has had to pay in this case, leaving out the question of the injury done to the public mind by the inflammatory nature of the attacks made upon the

courts by some very high in authority, ought to cause serious reflection upon the part of all thinking men. Lawyers above all others should use their influence to check the present growing method of indictment, trial and conviction by newspaper. Sober second thought may convince even a space writer that a result like the one mentioned does not reflect credit upon his methods and must ultimately lead to his paper and himself being brought into ridicule. "The shouting and the tumult dies," but the "unextinguishable laughter of the Gods echoes a long time." The newspaper men, it is true, had a great exemplar. Certain men high in the legal profession seem to have sacrificed opinion to pressure from higher places. We doubt if their course in the long result will redound as much to their credit, as the resignation of an humble district attorney who declined to allow his own idea of justice and right to be subordinated to another's will.

The Standard Oil Company may be—doubtless is—a great offender; but is entitled to the same fair trial and treatment at the hand of the law and law officers as our humblest citizen. No more, and no less.

Seldom we believe has there been a more shocking exhibition of the indifference or ignorance of a prosecuting attorney in regard to his duty to the prisoner at the Bar, than has been exhibited in the trial of Colonel Cooper for the

The Duty of the killing of Ex-Senator Carmaek, now going **State in a Crim- on** in Nashville, Tenn. It seems the state **inal Prosecution.** has summoned a physician as an expert.

His testimony, it appears from a private examination made by those representing the state, had a tendency to aid the defense. He was dismissed incontinently, though no suspicion of his absolute fairness, integrity or ability was raised. The defense desired to examine him privately before putting him on the stand. He declined, however, to converse with counsel until his fees were paid, the state having turned him adrift "feeless." The court was asked to require the state which had summoned him, to pay those fees. This was refused, and so the

defendant had to hustle around, get the money and examine the doctor—the result of which was to have him put upon the stand and give testimony of great value to the defense. Now can any one question the fact that it was the plain duty of the court to examine this man? The state surely, sitting in the seat of judgment, ought, like the Supreme Power it represents, to "take no delight in the death" of any man, but remember that he is entitled to every fact in its possession tending to prove him innocent.

In this State the Commonwealth's Attorney can say what witnesses he will call and his discretion will not be interfered with. But the trial judge can call any witness who was present at the transaction or whose name is on the indictment and not called by the Commonwealth, and when so called the witness may be examined or cross-examined by both sides, he not being the witness of either party. *Hill v. Commonwealth*, 88 Va. 633.

One who is in the habit of reading the opinions of the Supreme Court of the United States is continually struck with the fact that each opinion refers back to wellnigh

Citations in Opinions of Courts of Last Resort. every previous decision of that Court in anyway germane to the subject. The whole law of the case under discussion—as far as decisions of that tribunal is concerned—

can be easily traced from precedent to precedent, and the reader has no difficulty in finding all of the authorities from the Supreme Court "annotated" by the Court itself, so to speak, in the opinion. The value of such a system is hard to be over-estimated and we think the example of this great tribunal might well be followed by the courts of last resort in the several states. Our own Supreme Court has wisely recommended to the Bar to cite Virginia decisions as far as practicable whenever they can be found upon a point under discussion.

Might not the Court cite the Virginia authorities as thoroughly as the Supreme Court of the United States does its own? It frequently does, but in the late important case of *Louisa County v. Yancey*—annotated in this number—we cannot see why the Court should not have referred to *Fry v. Albemarle*, 86 Va. 195.

as to the liability of counties for torts, and *Beach v. Trudgain*, 2 Gratt. 219, as to the liability for destruction of buildings to prevent the spread of fire. The Court in *Louisa v. Fry* quoted Dillon on Municipal Corporations—an excellent book and high authority—but certainly not as high as the opinions of our own Court.

How far are text-books authority, anyway? The old English rule used to be to quote no text-writer as authority as long as he was alive. His book remained, so to speak, in **Text-Books.** the Luxembourg as long as he lived, following the example of the French, who transferred pictures from that gallery to the Louvre only when the artist was dead. This rule was as a matter of course abrogated and the Barristers began to quote living text-writers and have continued to the present time, without fearing the thunders of the Bench. To-day we are deluged with text-books, encyclopedias of law so-called in every conceivable shape, and the courts not infrequently quote the work of the tyro in the same class with the work of the master and refer to both as authority. The argument of the "case teacher" to-day is that nothing is well-determined law but the decision of a court and that the text-writer's opinion does not stand worthy of high consideration except as indicating his own peculiar views, unless it is well supported by decisions. Therefore, as cases after all make the law, a study of well-selected cases is as important to the law student as the study of the text-writer. We do not think the courts always mean to quote text-writers as absolute authority for a proposition, but merely as persuasive argument, but there is sometimes a carelessness in the way of stating a proposition from a text-writer, comparatively unknown except for his book, which gives the book itself a value to which it is not entitled. For ourselves we are inclined to think that a text-book from the hand of a master skilled in the law and whose work has stood the test of time and experience, is entitled to great weight. It is certainly an unbiased opinion of a careful thinker and to that extent should be of great persuasive value before the courts.